

ESTATE OF JOHN (PETE) PIXLEY
AND EMMA PIXLEY

IBIA 79-31

Decided April 15, 1980

Appeal from an order of Administrative Law Judge William E. Hammett, denying petition to reopen.

Affirmed.

1. Indian Probate: Reopening: Generally

An estate closed for 50 years will not be reopened except in extraordinary circumstances to correct a manifest injustice.

APPEARANCES: Richard L. Davenport, Esq., for appellant, Thelma Griffin.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

On April 27, 1979, Thelma Griffin filed a petition to reopen the above captioned estates, challenging the order determining heirs in the matter of the Estate of John (Pete) Pixley, dated February 27, 1929, wherein it was determined in part that Lizzie Toby was the surviving spouse of John Pixley and entitled to one-half of his trust estate. Petitioner indicated that her mother, Ivy L. Peters, age 88, widow of Frank Peters, half-brother of John Pixley and Ben Peters; and petitioner's uncle Cecil Peters, age 76, could testify that John Pixley was not married to Lizzie Toby at the time of his demise.

After reviewing the records in the above-named estates Judge Hammett found that the petitioner had not offered sufficient cause or evidence to support a reopening of said estates.

We find after a careful and complete review of these matters that a reopening is not warranted.

In the matter of the heirship of the Estate of Emma Pixley, deceased Washoe Allottee No. 483, Examiner of Inheritance John H. Anderson, on December 31, 1918, found from the evidence adduced at a

hearing concluded on December 31, 1918, that Emma Pixley died intestate, late in the fall of 1897, leaving surviving as her only heir, her husband, John Pixley, to whom her entire estate passed.

In the matter of heirship of the Estate of John (Pete) Pixley, deceased Washoe Allottee No. 482, E. B. Merritt, Assistant Commissioner of Indian Affairs, found on February 26, 1929, from the evidence adduced at a hearing concluded by Examiner of Inheritance John H. Anderson, on January 16, 1929, that John Pixley died intestate on December 3, 1928, having been married twice, first to Emma Pixley, who predeceased him, and then to Lizzie Toby, with whom he was still living at the time of his death. John H. Edmond, Assistant Secretary of the Interior, on February 27, 1929, further found from the evidence adduced at the hearing concluded on January 16, 1929, that the heirs of decedent John Pixley, and their respective shares in his estate, were Lizzie Toby--wife--one-half, and Belle Carson--mother--one-half.

The record establishes that Examiner of Inheritance, John H. Anderson observed all the witnesses and found them to be credible. Moreover, Frank Peters, half-brother of John Pixley, husband of Ivy L. Peters, mother of petitioner, corroborated the testimony of Annie Duncan, Pete Duncan, Lizzie Toby, John Pixley, Captain Pete, and Dick Bender, when they testified on March 14, 1918, and January 16, 1929, that John Pixley and Emma Pixley were husband and wife, and were still living together at the time of Emma Pixley's death in 1897; that John Pixley had one sister, Nettie Pixley, one brother, Ben Peters, and one half-brother, Frank Peters; and that John Pixley's second wife was Lizzie Toby, whom he married 10 years prior to 1929, and to whom he was still married at the time of his death.

[1] An estate closed for 50 years will not be reopened except in extraordinary circumstances to correct a manifest injustice.

We agree with Judge Hammett that a lapse of over 50 years in the occurrence of events would tend to dim the recollection of witnesses. For example, Thelma Griffin, stated that she was born April 19, 1918. Her sworn affidavit executed September 19, 1979, contains the following affirmation: "5. That your affiant knew and had been personally acquainted with one Ben Peters * * *." Obviously, the petitioner could not have been personally acquainted with Ben Peters since he died in 1914, prior to her birth. This is not to say, however, that persons ages 88 and 76 are incapable of offering testimony worthy of considerable weight. In this matter, Judge Hammett was stating a known fact, namely, that time tends to dim one's recollection.

The testimony elicited from the witnesses referred to, supra, in the hearings held in 1918 and 1929, was elicited from them while the events in question were uppermost in their minds in addition to being uncontradicted.

The Administrative Law Judge correctly found that petitioner's claim for relief is barred by her unexplained failure to make a timely petition to reopen, under the circumstances described. Estates of Morgan and Mary Black, 5 IBIA 219 (1976).

Relying upon the internally consistent evidence of seven contemporary and informed witnesses testifying directly about known events, the examiner in 1929 found Lizzie Toby to be the surviving wife of John Pixley. The evidence offered in 1979 to support the petition to reopen seeks to rebut that earlier testimony by reciting circumstances which the petitioner's witnesses use to construct a deduction that contradicts the 1929 finding. The evidence offered by petitioner is both stale and speculative. It is insufficient to support an order to reopen these estates.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order of the Administrative Law Judge dated May 30, 1979, is affirmed. This decision is final for the Department.

Mitchell J. Sabagh
Administrative Judge

We concur:

Frank Arness
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge